No. 90-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MCI COMMUNICATIONS CORPORATION, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, CONSUMER FEDERATION OF AMERICA, ENHANCED SERVICES COUNCIL, ALARM INDUSTRY COMMUNICATIONS COMMITTEE, ADAPSO, THE COMPUTER SOFTWARE AND SERVICES INDUSTRY ASSOCIATION, INC., INDEPENDENT DATA COMMUNICATIONS MANUFACTURERS ASSOCIATION, INC., TANDY CORPORATION, PHONE PROGRAMS, INC., OHIO CONSUMERS' COUNSEL, NATIONAL TELECOMMUNICATIONS NETWORK, MARYLAND PEOPLE'S COUNSEL, RADIOFONE, INC., AD HOC TELECOMMUNICATIONS USERS COMMITTEE, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

v.

UNITED STATES OF AMERICA, BELL ATLANTIC CORPORATION, AMERITECH, NYNEX CORPORATION, SOUTHWESTERN BELL CORPORATION, BELLSOUTH CORPORATION, PACIFIC TELESIS GROUP, U S WEST, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEFS IN OPPOSITION

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RULE 29.1 STATEMENT

Petitioners incorporate by reference the Rule 29.1 statement set forth in the Petition for Certiorari at iii-v.

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REPLY TO BRIEFS IN OPPOSITION

This case involves a consent decree of unique national importance. The Court of Appeals' ruling threatens a substantial change in the meaning of that decree and in the structure of the telecommunications industry. Respondents do not deny the decree's extraordinary significance or the political impact of the ruling. Instead,

respondents urge this Court to decline review on the grounds that the Court of Appeals interpreted the decree correctly, no issues of general significance are involved, and review might be more appropriate at an undefined future time. None of these arguments supports denial of certiorari.

ARGUMENT

1. Respondents' defense of the result below is utterly unpersuasive. Respondents never come to grips with the language of the decree provision at issue. That is not surprising, for the plain language of Section VIII(C) cannot be read to provide different standards for waiver requests depending on whether the request is contested or uncontested:

> The restrictions imposed upon the separated BOCs by virtue of Section II(D) [the line of business restrictions] shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

United States v. AT&T, 552 F. Supp. 131, 195 (D.D.C. 1982). This clear statement should resolve any issue as to the intended scope of Section VIII(C), without resort to extrinsic evidence.

To escape Section VIII(C)'s plain meaning, respondents have resorted to scraps of "history" surrounding the formation of the decree to imply an understanding that is nowhere stated in its unambiguous text. This approach violates fundamental principles of construction which dictate the primacy of language in statutes, contracts, and decrees. It also requires acceptance of the anomalous argument that a skilled and experienced district judge, seeking to "avoid any question about the appropriate test for removal" of the line-of-business restrictions, nevertheless failed to express his intent. *See* 552 F. Supp. at 195. If the district judge had intended to require a "flexible" public interest standard for uncontested waiver motions (*see* 900 F.2d at 309; App. 55a), it was well

within his capability to say exactly what he meant. Furthermore, if Section VIII(C) contained any ambiguity—and it does not—compelling evidence of its true meaning is its author's repeated confirmations that Section VIII (C) was intended to govern *all* waiver requests, whether or not they are opposed. *See United States v. Western Electric Co.*, 673 F. Supp. 525, 534 (D.D.C. 1987); *United States v. Western Electric Co.*, 592 F. Supp. 846, 850 (D.D.C. 1984), *appeal dism'd*, 777 F.2d 23 (D.C. Cir. 1985); 552 F. Supp. at 195 (D.D.C. 1982).

Indeed, the entire history of the decree's administration refutes respondents' implied limitation on the reach of Section VIII(C). The Bell Company respondents are, for example, flatly wrong in suggesting that "all parties to the decree" have consistently understood Section VIII(C) not to apply to uncontested waiver motions. *See* BOC Opposition at 11. The United States had *never* advocated that view prior to opposing the instant Petition, and explicitly refused to adopt it as recently as oral argument before the Court of Appeals in this case.[1] Nor has AT&T ever advocated the view that Section VIII(C) could be displaced by a "flexible" public interest test for uncontested motions.[2]

Only the Bell Companies espoused the position ultimately adopted by the Court of Appeals, but even they converted to that position late in the day. During the triennial review proceedings, no Bell Company moved

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[1] *See* Transcript of Oral Argument, at 24-29, cited in Petition for Certiorari at 12 & n.23.

[2] To the contrary, AT&T argued in the district court that in light of the Bell Companies' inability to meet the Section VIII(C) test, they could obtain removal of the information services restriction only if they could meet the strict *Swift* modification test. AT&T's Reply Comments on the Report and Recommendations of the United States, May 22, 1987 at 17-18; *see United States v. Swift*, 286 U.S. 106, 118 (1932).

under Section VII for removal of the information services restriction; every motion invoked Section VIII(C).[3] *See* Petition for Certiorari at 11 n.17. As the appellate court noted in its summary of the triennial proceedings, "*both* the district judge *and* the parties treated removal of the line of business restrictions as though it were governed *entirely* by Section VIII(C)." 900 F.2d at 295; App. 26a (emphasis added).

Nor did the Bell Companies take a different position on Section VIII(C) in earlier proceedings. Their sporadic references to Section VII (in ten out of over 130 waiver requests) shed no light on the instant issue, because it is Section VII that grants the district court jurisdiction to consider all decree-related motions, including those under Section VIII(C). None of the motions mentioning Section VII suggested any distinction between contested and uncontested motions. To the contrary, the Bell Companies invoked Section VII even when the motions were contested.[4] Virtually all of the Bell waiver motions, including those respondents cite, proffered Section VIII(C) as the governing standard. Indeed respondents cite motions that explicitly acknowledge that Section VIII(C) governs:

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[3] Respondents attempt to explain their failure to invoke the Section VII standard in initial motions in the triennial and earlier waiver proceedings by claiming uncertainty as to whether the motions would be contested. However, any advocate faced with the uncertainty respondents now posit would have invoked all potentially applicable standards, and would have argued in the alternative. Moreover, many waiver motions uncontested by original decree parties were contested by intervenors, yet the Bell Companies never suggested that a more "flexible" Section VII standard should control until the triennial proceedings.

[4] *E.g.*, Motion of NYNEX, filed February 15, 1984 (re office communications systems); Motion of BellSouth, dated February 24, 1984 (re NASA contract).

> [t]he decree itself contains the standard by which this [line-of-business] prohibition may be waived, at Section VIII(C).

Memorandum in Support of Motion of BellSouth, filed January 27, 1984, at 8 (citation omitted). Another cited motion similarly confirms that "[t]he standard by which a waiver of the restriction shall be granted is set forth in Section VIII(C)." Memorandum in Support of Motion of BellSouth, dated February 24, 1984, at 6.

To paper over their prior practice of consistently invoking Section VIII(C), respondents now suggest—for the first time—that they were compelled to do so by the district court's July 1984 order requiring "submission of all waiver requests to the Justice Department for market analysis under the Section VIII(C) standard." BOC Opposition at 13; United States Opposition at 10. That assertion surely cannot explain respondents' consistent invocation of Section VIII(C) prior to the 1984 order. Nor can respondents' claim be squared with their own submissions in the proceedings leading to the 1984 order, in which they uniformly advocated Section VIII(C) as the proper standard, and never offered Section VII as the alternative standard for uncontested motions.[5] Had

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[5] *See, e.g.*, Southwestern Bell Corporation's Response to the Memorandum of the United States Concerning Removal of Line of Business Restrictions Pursuant to Section VIII(C), at 3 (filed Mar. 23, 1984) ("The appropriate standard to be espoused with regard to whether or not Southwestern Bell should be permitted to enter into a new line of business is the antitrust-type standard set forth in Section VIII(C) of the decree. . . ."); Response of Ameritech to Proposal of the Department of Justice to Restrict Section VIII(C) Waivers, at 2 (filed Mar. 23, 1984) ("[T]he Court adopted a standard for determining the permissible scope of an operating company's lines of business without unnecessarily restricting their operations. That standard permits an operating company to expand its line of business where 'there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.' Decree § VIII(C)"); Response of BellSouth Corp. to the Memorandum of the United States Concerning Removal of Line of Business Restrictions Pursuant to Section VIII(C), at 6 (filed

the district court's 1984 order wrought a radical change in the standard as respondents now contend, they would have said so. Their silence at the time speaks volumes about what they then thought Section VIII(C) meant.

2. Given the stakes in this case, the need to correct the Court of Appeals' error alone justifies intervention by this Court. This Court would not countenance an appellate court's selective use of scraps of "history" to rewrite a statute in contravention of its plain meaning and consistent prior interpretation. Respondents present no reason why the Court should permit the same type of conduct in contravention of a consent decree of unparalleled scope and importance. This Court often grants certiorari to correct such errors in cases of great importance, even if the error involved was particular to the case in which it arose,[6] and it should do so here.

In addition, this case indisputably raises issues of general jurisprudential significance respecting the appropriate standards for reviewing district court interpretations of consent decrees. If, as the Court of Appeals held, Section VIII(C) is ambiguous, 900 F.2d at 306; App. 49a, and consent decrees should be interpreted as contracts, 900 F.2d at 293; App. 22a (citing, *inter alia*, *United States v. Armour & Co.*, 402 U.S. at 681-682), then the district court's interpretation of the meaning of Section VIII(C) should have been reviewed under a "clearly erroneous" standard.[7] At a minimum, the Court

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Mar. 23, 1984) ("The threshold standard in the Decree which must be met before entry into new markets is permitted is a showing of 'no substantial possibility 'of specified harm, e.g., impeding competition in the relevant market through the use of monopoly power").

[6] *E.g.*, *Pension Benefit Guarantee Corporation v. LTV Steel Corporation*, 110 S. Ct. 2668 (1990); *cf. Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 336 (1982). *See generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 222-223 (6th ed. 1985).

[7] *See* Petition for Certiorari at 23 n.40 (citing cases).

of Appeals' application of a *de novo* standard of review to an ambiguous decree provision is in substantial tension with the principles federal appellate courts apply when reviewing issues of contract interpretation—a point respondents do not even attempt to rebut.

Nor can respondents hide the conflict the Court of Appeals itself acknowledged with respect to how much deference should be accorded a district court interpretation of a disputed consent decree provision. As respondents would have it, no conflict exists because the Court of Appeals merely held that it would "not discard its own assessment of a decree's plain meaning in blind deference" to the district court's contrary interpretation. BOC Opposition at 17. As respondents elsewhere acknowledge, however, the Court of Appeals concluded that the decree's meaning was not clear on its face. The question presented by this case, therefore, is whether an appellate court should accord deference to a district court's interpretation of an ambiguous decree provision when the district court drafted the provision and interpreted it consistently over the years. The Court of Appeals' refusal to accord deference under those circumstances conflicts, in letter and spirit, with standards of review applied in other Circuits. *See* Petition for Certiorari at 21.[8]

3. Intervention at this time is both appropriate and necessary. Respondents identify no jurisdictional bar to immediate review. They instead suggest that forebearance would advance judicial economy. But respondents are wrong. If, as petitioners contend, the Court of Appeals erred in supplanting the Section VIII(C) standard

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[8] The Bell Company respondents seek to avoid the force of *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959), by misstating the basis for petitioners' reliance on it. Contrary to the Bell Company respondents' assertions, petitioners do not argue that *Atlantic Refining* creates a rule of appellate deference. *See* BOC Opposition at 17-19. Rather, petitioners contend that *Atlantic Refining* sets forth substantive legal principles for determining the meaning of a consent decree. *See* Petition for Certiorari at 17-21.

with a "flexible" public interest standard, the extensive remand proceedings scheduled by the district court will be for nothing. Furthermore, none of the factual development on remand will bear on the proper interpretation of Section VIII(C).[9]

Nor would denial of review preserve the stability and settled expectations of participants in the market for information services. By undercutting what had been a clear standard for all waiver motions, the Court of Appeals has altered administration of the decree's line-of-business restrictions. The appropriate question for this Court is whether the uncertainties created by that ruling should be resolved now or prolonged for years. As the United States told the Court of Appeals, the use of an incorrect legal standard "not only increases the burden of proceedings and the risk of legal error, but impinges on the ability of firms in the telecommunications industry to undertake rational business planning." Brief for Appellant United States, Nos. 87-5397, 88-5282, at 48 (April 1989). Postponing review serves the interests of no one but the Bell Company respondents, who suddenly have had opened to them the possibility of dominating the developing markets for information services.[10]

The pressing national interest in prompt review was well stated by the United States in the court below:

> the magnitude of the interests affected by this decree is too great for this Court to allow to stand un-

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[9] The remand will involve factfinding on the separate question whether elimination of the information services restriction would be consistent with the Section VII standard.

[10] Furthermore, respondents are simply wrong to suggest that petitioners and the public will suffer no harm if the information services restriction is retained on remand. The Court of Appeals' ruling has created enormous uncertainty with respect to the proper standard for judging all motions for waiver of line-of-business restrictions, not merely those involving information services. The disruptive impact of that uncertainty will thus persist whether or not the district court retains the information services restriction on remand.

> corrected a decision that strays so far from the competitive-based standard mandated by the decree. The parties and the public are entitled to be assured that a decision as important as the first triennial review is based on the proper legal standard.

Brief for Appellant United States at 45.[11]

CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in the Petition for Certiorari, this Court should grant the Petition for Certiorari.

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[11] The United States sought review of the substantive Section VIII(C) standard applied by the District Court to all pending motions ni the triennial proceedings. *See* 900 F.2d at 295-300; App. 26a-36a.

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